

To: Mueller, Sarah[Mueller.Sarah@epa.gov]
From: David Taylor
Sent: Fri 9/11/2015 3:14:47 PM
Subject: RE: access to allotment lands

Hi Sarah,

Your approach looks fine to me.

Dave

David A. Taylor

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From: Mueller, Sarah [mailto:Mueller.Sarah@epa.gov]
Sent: Thursday, September 10, 2015 5:18 PM
To: David Taylor
Subject: RE: access to allotment lands

Dave,

Please see the email below from Joan Marsan in the DOI Solicitor's office, which follows a discussion I had with her about the letter that Sharon Pinto had asked EPA to draft that would be sent by BIA to allottees regarding access to property for AUM work under CERCLA. Joan did not think the letter should come from BIA, and wants it to come from EPA. We have discussed that here in Region 9 and think that the approach outlined in my draft email (enclosed in quotation marks) below would work, if it is acceptable to you and to BIA. Below is a draft email I would send to Joan if you think this approach is OK.

Can you let me know your thoughts?

Thanks very much.

"Thanks Joan.

After discussing this issue and your recommendation for the letter to come from EPA, we would plan to take the following actions, subject to discussion with NNDOJ and NNEPA, with respect to obtaining access to allotted lands for actions under CERCLA involving sampling, investigation, and removal of contaminated material:

- Send a letter from EPA to all allottees (identified through TSRs provided by BIA) similar to the one we drafted at the request of Sharon Pinto. This letter would notify allottees of the planned actions and locations, and provide contact information and any other community involvement information. This letter would also be copied to BIA.

- Obtain consent from anyone living on the land or otherwise using the land, when such use of the land is similar to a possessory interest (the consent forms we use are the same as the one you attached from Tar Creek, although EPA does not sign the forms). If a potentially responsible party (PRP) is undertaking the response actions under EPA oversight, the PRP would be obtaining access agreements.

- In appropriate situations, PRPs may be designated as representatives of NNEPA for purposes of access (see attached letter as an example [attach letter from D.Taylor on Homestake and Black Jack mines]). Such a letter could be distributed to any residents and/or allottees, as well as BIA.

We would appreciate hearing back from you as to whether or not this approach is acceptable to BIA. As I had mentioned when we spoke, we initiated this discussion with Sharon Pinto

because EPA staff and PRPs had been informed by some BIA representatives that we had to follow BIA's regulations on obtaining rights-of-way, and we did not believe this process was consistent with our authority and practices under CERCLA.

There is some urgency to this matter, as we hope to have a responsible party engage in a time-critical removal action under EPA oversight at the Haystack Mines Site, which includes two allotment parcels, during this construction season, in order to address threats to public health with regard to residents on those parcels.

Please feel free to contact me to discuss or with any questions.

Thanks very much.

Sarah"

Sarah E. Mueller

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Region IX

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From: Marsan, Joan [<mailto:joan.marsan@sol.doi.gov>]

Sent: Friday, August 28, 2015 11:01 AM

To: Mueller, Sarah

Subject: Re: access to allotment lands

Sarah,

After talking with my colleagues in DC, I definitely think it makes sense for any letter to allottees to come from EPA--that has been EPA's past practice. We very much like your idea of

providing notice to BIA (perhaps by copying the communication to allottees to BIA, as well). The BIA Regional Director would find it helpful to receive notice and copies of correspondence because affected parties often go to the BIA for additional information (even if something is another agency's action).

One of our attorneys sent me a copy of the consent form that was sent to allottees when EPA Region 6 was working on the Tar Creek site. I'm attaching it here because you may find it helpful if you haven't already seen it. In that instance EPA and the Quapaw Tribe both wanted to be signatories on the allottees' consent forms, though the inclusion of the Tribe as a signatory was not considered legally required.

I hope this is helpful to you.

Joan

On Wed, Aug 26, 2015 at 6:08 PM, Mueller, Sarah <Mueller.Sarah@epa.gov> wrote:

Joan,

Thanks for speaking with me today.

Here is a link to the EPA Superfund webpage with guidance on access under CERCLA.

http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/index.cfm?action=3&sub_id=109

What are your thoughts on whether or not EPA needs BIA's consent to access allotment parcels? My understanding is that BIA approval to encumber restricted title held by individual Indians is required under the regulations, but CERCLA access does not encumber or affect title. This factor might indicate that it makes more sense for the letter to come from EPA instead, so that the letter does not imply that BIA has consented (a letter from EPA could say that we have been in communication with, or notified, BIA).

As I mentioned, our goal is to get consent from those who actually use the property, such as residents. If the number of allottees is small, we would additionally seek consent from all

of them.

If the number of allottees is large, and it would not be practicable to seek consent from all, we would, as always, seek consent from anyone who is actually on the property or using it in some way, and notify all other allottees (the purpose of the letter, whether it comes from BIA or EPA). This seems consistent with the regulations on rights of way, under which BIA can approve a right of way without the consent of the owners if the owners are so numerous that it would be impracticable to obtain consent and the right of way would not cause substantial injury to the land or any owner.

I will get back to you on thoughts here about the letter coming from EPA, and any estimates we might be able to make about how many allotment parcels might be affected.

Thanks.

Sarah

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